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JURISDICTION OVER FOREIGN SHIPS IN TERRITORIAL WATERS *

"WAR," says Grotius, "is undertaken for the sake of peace." So discussion is undertaken for the sake of conclusions. If the conclusions are not as definite as could be wished in the present instance, it is hoped that it is not wholly due to the indolence or incompetency of the writer, but in large part to the difficulties presented by the overlapping of municipal and international laws, and by the lack of any final tribunal which can adjust and end differences. Again Grotius, and there is no better authority, quotes approvingly certain rules of mercy as part of the law of nations, but adds, "not of all, but of the best," and so we can only try to deduce the rules "of the best."

With this apology it seems right to say that under the topic named it is not proposed to go generally into the subject of the nature and extent of the rights in the sea appertaining to the adjoining coast.

Even the greatest expanse of water known to the geographer, the Pacific Ocean, was claimed as within the jurisdiction of a great power in the past, and the seas were largely apportioned among the maritime states. Portugal claimed the Guinea seas, and the path to the Indian Ocean by way of the Cape of Good Hope, as within her exclusive dominion; under the Stuarts, England asserted control over the Atlantic Ocean lying between her own coast and her American colonies. The Scandinavian and Russian powers claimed absolute ownership of the Baltic; Venice of the Adriatic, symbolizing her claim by the rites of marriage.[1]

No one of these "vain and extravagant pretentions," as Lord C. J. Cockburn called them, survives. The last claim, bearing some

* The substance of this paper was given by Dean Gregory before the International Law Association at its meeting at Antwerp, Sept. 29, 1903.

[1] Le Droit International, Calvo, Tom. 1, 471, Paris, 1896.

kinship with them, seriously advanced, was that of the United States concerning Behring Sea. An arbitration of that question resulted in a decision by the majority of the arbitrators that no exclusive rights of jurisdiction in Behring Sea, and no exclusive rights as to the seal fisheries therein, were held or exercised by Russia outside of the ordinary territorial waters after the treaty of 1825. .

"That the United States has not any right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit."

This decision was promptly accepted as establishing the rights of the governments concerned and of their citizens, and the courts of the United States, in the case of *La Ninfa*,[1] decided in 1896 that the penal laws of the United States had no operation in the waters of Behring Sea beyond three miles from the shores of Alaska, at least as to persons not subjects of the United States, and not upon a vessel of that nation; that therefore a criminal prosecution against an alien upon a foreign vessel for taking fur bearing animals "within the limits of Alaskan territory or in the waters thereof," could not be sustained where the act complained of was committed more than three miles from the Alaskan shore.

The present secretary of state of the United States has accordingly officially admitted that no jurisdiction beyond a marine league from shore is claimed. He admits like jurisdiction in other states over territorial waters, but no *more*, unless a different rule is fixed by treaty between the two states, and then the agreement affects the treaty states only.[2]

Quite early the continental writers, as is known, under the lead of Grotius, advanced and maintained the doctrine of *mare liberum*, the English writers, under the lead of Selden, for a time maintaining the contrary. So attached to this claim of sovereignty over the surrounding seas had Great Britain become that in 1803, when negotiations for settlement of the right of search had nearly been consummated, they were broken off because she could not be induced to concede freedom from it within the British seas.[3] Beliefs and doctrines are commonly consonant with expediency, and the maritime supremacy of Great Britain may have conduced to the attitude of her writers. It is curious that this last great contention for *mare*

[1] 75 Fed. 513,

[2] Revue de Droit Intern. et de Legislation Compareé, 1903, p. 79.

[3] Taylor, International Law, p. 292, citing Mr. King to Mr. Madison, British and Foreign State Papers, 1812--14, p. 1404.

clausum was between the nation of Selden and her kindred nation, and that Great Britain stood for the limit of sovereignty, not its extension.

Now that the dominion is limited to space, either found between headlands or enclosing points of land, or extending but a cannon shot or three miles from the open coast, this limited right is still further questioned and discussed. M. de la Pradelle, in the *Revue Generale de Droit International Public*, in 1898 maintained with great elaboration and learning that the adjoining states have over this latter space not ownership, but a right of empire, a power of legislation, of surveillance and of jurisdiction, and he quotes Calvo to support his view. He says that the word sovereignty is too strong for the right of the adjoining nation over the littoral sea. That the right is even less energetic and more vague than jurisdiction, that it varies greatly upon different coasts, and, according as it is exercised with regard to the fisheries, the customs, quarantine, control of navigation or matters of neutrality, and he reaches the conclusion that it is not sovereignty or jurisdiction, but a mere bundle of separate rights, founded in convenience or necessity.

However, without going into the question of the variations of claims as to the littoral sea, it may be taken for granted that every nation has jurisdiction over her ports, gulfs and bays which are enclosed within her borders. As to what waters must be treated as so enclosed, there is no complete agreement. According to one theory, if the points of land guarding the entrance to the water are sufficiently near so that persons upon one side can distinctly see persons upon the other with the unaided eye, the waters within such points belong to the adjoining nation. In others, the ability to command the mouth of the harbor by batteries placed upon the shores is regarded as the test. While bays whose "fauces" are not more than from 6 to 10 miles apart are commonly admitted to belong to the shore, the rule has been very commonly reached that waters which are enclosed within the territory of a given country, but with far wider openings to the sea, may be regarded as part of the territory of that nation, if for a length of time undisputed jurisdiction has been claimed and exercised. Thus a British ship, the Grange, in 1793, having been captured in Delaware Bay, a large expanse of water surrounded by the territory of the United States, and the capture having been by a French privateer, Great Britain demanded that the United States compel France to release the captured ship, on the ground that the seizure was unlawful, as having been made

in the territorial waters of the latter country. The attorney-general of the United States, Mr. Randolph,[1] gave his written opinion that the whole of the bay was within the territorial jurisdiction of the United States, regardless of the marine league or cannon shot limit from the shore, resting his opinion on the fact that the "United States are proprietors on both sides of the Delaware, from its head to its entrance into the sea." Mr. Jefferson, acting upon this opinion, demanded of France the restitution of the Grange, and the demand was promptly complied with by the French government. The doctrine therefore here maintained was in the first instance asserted by Great Britain, acquiesced in by the United States, and asserted by her; and acquiesced in further upon demand by France, so that these three great powers, with different interests, concur. The Privy Council of England,[2] *Held*, in a conflict between marine telegraph companies, that Conception Bay, though having an average width of fifteen miles for forty miles from its entrance, and although the headlands were twenty miles apart at its mouth, yet was territory of Great Britain on like grounds, under an act of George III., seeming to recognize it as such.

The Court of Commissioners of Alabama Claims, in 1885, held that Chesapeake Bay, including those portions of it more than a marine league from the shore, is territorial waters of the United States, and subject to its exclusive jurisdiction.[3]

For some hundreds of years, by the almost unanimous consent of civilized nations, every maritime state has been allowed special rights of control or jurisdiction in and over a portion of the littoral sea adjoining its territory, even though not included within headlands or projections of land, and the limit of a cannon shot proposed about two centuries ago has been the parent of the prevailing rule.

Mr. Thomas Barclay maintained in 1892, before the Institute of International Law, that this modern limit appears to have been first recognized by the government of the United States in 1793, when Mr. Jefferson wrote to the English minister that a marine league had been provisionally adopted as that of the *mer territoriale* of that country.

This territory cannot be said to have been uniformly limited, but

[1] 1 Opinions Attorneys-General, 15.

[2] The Direct United States Cable Co. *v.* Anglo-American Telegraph Co., L. R. 2 App. Cas. 394, Snow's Cases International Law, p. 45.

[3] Stetson *v.* United States, 4 Moore's International Arbitration, 4333; Scott's Cases International Law, 143.

by the great weight of authority the space over which such rights may be exercised is, as was held in the Behring Sea award, three miles from the low water mark. The question that I desire to discuss is the jurisdiction actually asserted and maintained by the adjoining nation over vessels in these territorial waters, whether partially land-locked, as in the case of bays and gulfs, or portions of the littoral sea within the three-mile limit.

In the first place, vessels must be divided into two classes, private ships and government ships. The government ships again may be subdivided into ships of war and those engaged wholly in other national service on the one side, and those which unite some such national service with functions common to commercial ships, as, for instance, ships which carry the government mails and which are owned by the state, and yet which also carry passengers and goods for hire.

GOVERNMENT SHIPS

The dominion over a ship of war belonging to a friendly power upon its entering the territorial waters of a sovereign other than its own, was not always distinguished from the dominion over a merchant ship. Thus, Bynkershoek cites the case of Spanish ships of war seized in Flushing in 1608 by a private individual for a debt due from the king of Spain.[1] There the States General interposed, it is believed, and the vessels were released by the interference of government. In 1794, Mr. Bradford, attorney-general of the United States, held in a case where six American citizens were taken out of a British sloop of war lying in the harbor of Newport, Rhode Island, that "the law of nations invests the commander of a foreign ship of war with no exemption from the jurisdiction of the country into which he comes,"[2] and it was held that a writ of *habeas corpus* might be awarded in such a case. One year later, in 1795, however, the supreme court of the United States, by writ of prohibition, forbade the judge of a federal district court at Philadelphia to detain a French ship of war, the Cassius, by libel, or to arrest the commander for alleged tortious taking of an American ship on the high seas.[3] Yet in 1799, Mr. Lee, attorney-general of the United States, held as to the British packet Chesterfield, that "it is lawful to serve civil or criminal process upon a person on board a British ship of war

[1] Taylor's Int. Law, p, 303.

[2] Taylor, International Law, p. 303, 1 Opinions of Attorneys-General, U. S., p, 47.

[3] U. S. *v.* Peters, 2 Dallas, 121; Wharton's State Trials, 93; Snow's Cases, 405.

lying in the harbor of New York.[1] In 1812 the question was squarely presented to the supreme court of the United States. The American schooner Exchange was seized by the order of the Emperor Napoleon Bonaparte in 1810, in Spain. She was then armed and commissioned as a public vessel of France. She sailed for the West Indies, and on the voyage entered the port of Philadelphia, in the United States. Her original owners libeled her. The government of the United States intervened, and suggested to the court that, as there was peace between the two countries, a public vessel of France could enter the ports and harbors of the United States and depart at will, without seizure or detention. The first decision dismissed the libel on the above ground. This was reversed on appeal, and the case came on a final hearing before the supreme court, where Marshall, chief justice, gave the opinion. He said that he was exploring an unbeaten path, and was compelled to rely much on general principles. His argument was that all nations were equal and independent. That it was understood that each waived the exercise of complete and exclusive territorial jurisdiction in certain cases, in the interest of mutual intercourse. That thus the person of a sovereign is exempt from arrest in a foreign territory; that like immunity was allowed to foreign ambassadors. That consent to these rules of international law was implied. That if a sovereign ceded to the troops of a foreign prince the right to pass through his dominions, there would be an implied cession of all sovereignty over them during such passage. That by common custom, the right is ceded to ships of war of a friendly power to enter our ports. That this must carry with it a like cession of all authority over them. That therefore a government ship of France, although she was originally an American vessel wrongfully taken, could not be libeled by her original owner in the ports of the United States, since she had entered on the terms on which ships of war are generally permitted to enter the ports of a friendly power, and had therefore come in under an implied promise that, while demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country. This case has proved a leading case upon the subject, and has been followed, it is believed, throughout the civilized world.

Eight years later, John Brown, a British subject, commanded a vessel involved in a revolutionary affair in the Spanish colonies. He was imprisoned by Spanish authority, but escaped and took

[1] Taylor on Inter. L., 303, 1 Opinions Attys.-General U. S., p. 87.

refuge on an English man of war "Tyne" lying in the port of Lima, and was carried on her to England. Complications arising, Sir Wm. Scott's opinion was taken by the admiralty, and he absolutely repudiated the doctrine of the exterritorial character of public vessels, saying that the attempt to establish such doctrine has always been most perseveringly and at all hazards resisted and defeated by the arms of his country, as inconsistent with the rights of hostility and capture. He admitted that to a certain extent ships of war were not themselves liable to the civil process of the country in whose ports they are lying, but declared that "if the British flag converts a man of war into British territory, the flag of other nations must be allowed to possess the same property in their marine, for there is no principle whatever that can be appropriated exclusively to the British flag." He says, "I am led to think that the Spaniards would not have been chargeable with illegal violence if they had thought proper to employ force in taking this person out of the vessel."[1] Lord Castlereagh's instructions to the British minister at Madrid conformed to the above opinion, but Lord Palmerston in 1849 expressed a contrary view.[2] In 1855, Mr. Cushing, attorney-general of the United States, held that a prisoner of war on board of a foreign ship of war or her prize, "can not be released by *habeas corpus* issuing from courts of the United States or of a particular state"; and in 1856 that "ships of war enjoy the full rights of extraterritoriality in foreign ports and territorial waters";[3] and it may be added that the right of asylum has been frequently granted in South American ports by ships of war of the United States.

In *Tucker* v. *Alexandroff*,[4] the late Mr. Justice Gray, whose great and accurate learning is known, in a dissenting opinion, points out that this case of the Exchange has ever since been recognized as laying down the principles which govern the subject; that Marshall's very language has been embodied by Wheaton in his *Elements of International Law*,[5] Phillimore in his *Commentaries on International Law*,[6] and he says: "Long usage and universal custom entitle every "such ship to be considered as a part of the state to which she

[1] Case of John Brown, Halleck's International Law, 1,185; Snow's Cases on Inter. L., p.144.

[2] See note to above case, Snow's Cases, p. 146.

[3] Note Scott's Cases, p. 147; Wharton's Digest, 1, 138.

[4] 183 U. S. 424, (in 1901.)

[5] Pt. 2, Chap. 2, 8th Ed., secs., 96-101.

[6] 3d Edition, 476-479.

belongs, and to be exempt from any other jurisdiction." "The privilege is extended by reason of the thing, to boats, tenders, and all appurtenances of a ship of war, but it does not cover offenses against the territorial law, committed on shore." And in 1880, Lord Justice Brett, (since Lord Esher, M. R.,) delivering the judgment of the English Court of Appeals, dealing with "the reason of the exemption of ships of war and some other ships," said: "The first case to be carefully considered is and always will be *The Exchange.*"[1]

In 1879, in the case of the *Constitution*,[2] a notable decision was rendered by Sir Robert Phillimore, in the High Court of Admiralty. The American frigate *Constitution* was returning to her own country from France, with a cargo of articles which had been exhibited at the World's Fair at Paris, when she was stranded upon the English coast. She was taken off by an English tug, which made a claim of fifteen hundred pounds for her services. The American consul at Portsmouth forwarded a check for two hundred pounds, deeming that adequate. The owner of the tug was dissatisfied, and applied to the court for an order to issue a warrant to arrest the *Constitution* and her cargo. The court directed that the case stand over, and suggested that it would be proper to give notice to the American minister at London, and to Lord Salisbury, secretary for foreign affairs, and accordingly heard counsel for the United States and for the crown. The court finally held that it had no authority to issue a warrant, and that no precedent existed for such a course, and that there was no doubt of the "general proposition that ships of war belonging to another nation, with whom we are at peace, are exempt from the civil jurisdiction of the courts of this country." Dr. Scott, in giving this case in his Cases on International Law,[3] calls attention to the fact that Mr. Cobbett, in his cases on the same subject, says that before the decision of this case there was doubt whether salvage proceedings might not be instituted in the English court of admiralty against a public vessel, the doubt resting upon an expression used by Sir Robert Phillimore in the case of the *Charkieh*. That celebrated case had already held, in 1873,[4] that in an action against the steamship *Charkieh* for damages arising from a collision between her and a Netherland steamship in the river

[1] The Parlement Belge, L. R. 5 Prob. Div. 197, 208.

[2] 48 Law Journal, P. D. and A., 13.

[3] Page 219.

[4] L. R., 4 Adm. & Ecc., 59; Scott's Cases, page 48.

Thames, the exemption allowed to the public ships of a sovereign could not be allowed to the *Charkieh*, since she belonged to His Highness, the Khedive of Egypt, and the Khedive had not complete sovereignty, being subject to the Ottoman empire.

This privilege of extraterritoriality, which belongs to commissioned government vessels, is illustrated by the rule already alluded to, that prisioners may be detained on board a commissioned ship of a belligerent power, even in the waters of a neutral.[1] And in a note, Mr. Hall says that Hautefeuille and Calvo maintain that this right extends to prizes, so that prisioners may be detained on board them. The United States attorney-general has, as we have seen, so held. Members of the crew of a ship of war while on shore are plainly subject to the laws of the country.

This rule as to extraterritoriality is often called the French rule, and is strongly supported by the French writers in general, and especially by Ortolan.[2] In that work,[3] he calls a vessel of war a movable fortress, bearing on its breast a portion of the public power of the state, with officers and equipage, which, altogether, form an organized corps of functionaries and agents, military or administrative, of the nation. He says further as to these ships the international custom is constant. The laws, the authorities, and the jurisdictions of the state in whose waters they are anchored, remain foreign to them. They have with that state but international relations, by the voice of the functionaries of that locality competent for such relation. He shows further[4] that ships of war are subject to the sanitary rules of the country in whose waters they are. He defends the independence of these vessels in both theory and practice. He points out[5] that a squadron may be refused admittance to the harbor where prudence requires. In 1825, a French fleet was delayed some hours in entering the harbor of Havana by the Spanish authorities, until the difficulties were removed by the explanation of the French admiral, and recently the government of Great Britain has been questioned in Parliament onaccount of a considerable foreign squadron of armed vessels having been received in an Indian port. Treaties sometimes provide that war ships shall be received only in limited number,

[1] Hall's International Law, page 621.

[2] Diplomatie de la Mer, p, 301.

[3] P. 214.

[4] Page 218.

[5] Page 155.

and many provide that from three to six are as many as shall be be entertained at once.[1]

The argument that a ship of war ought not to be treated as a place of refuge for criminals, any more than the house of an ambassador, certainly appeals to reason; but, except in a limited number of countries; where governmental disturbances have been common, no such right of sanctuary attaches to the ambassador's house, and none such, it is believed, to vessels of war, except that local process cannot be executed upon their decks. The difficulty and embarrassment of removing a fugitive from a vessel of war, when he has been received there, is very great. As a result it is believed that the officers of such vessels are commonly instructed only to receive fugitives in very extraordinary cases, and that there is no practice of receiving them when they are mere fugitives from criminal justice, the cases arising almost exclusively dealing with political refugees.

Even ships of war are subject to control by the harbor authorities, although no ordinary methods of police would control such a ship when violating the rules or orders of these authorities. A most conspicuous example of such control, and of acquiescence, was afforded by the United States ship of war, the Maine, in the harbor of Havana; shortly before her mysterious destruction she was directed, by the officer of the Port, to change her anchorage, and complied.

Admiral Evans, in a book of Published Memoirs, relates that while in command of an American ship of war in a harbor of one of the South American powers, with which the relations of his own country were at the moment somewhat complicated, he was greatly troubled by the torpedo boats of the local power performing their daily drill in the immediate vicinity and in dangerous proximity to his own ship, so as to seriously threaten its safety; that he stopped this by a threat of their destruction. This is quoted from memory, without access to the Memoirs at the present moment, but as indicating the difficulty which may, perhaps, have to be considered in view of the great increase of the use of submarine explosives in naval warfare. How far may a government ship in a neutral harbor claim dominion, not only over her own decks, but also over some limited portion of the adjoining water necessary for her own protection? It is difficult to see how such claims can be allowed, and at the same time the incident mentioned perhaps shows a difficulty which must more and more recur.

[1] Ortolan, Diplomatie de la Mer, p. 155.

As illustrating the complications arising from the doctrine of extraterritoriality, an incident may be cited of which the writer is advised by Gen. E. S. Bragg, as having occurred in the harbor of Accapulco, while he was minister of the United States, accredited to the Republic of Mexico. Two ships of war of the United States were anchored in the harbor, and desired to transfer certain coin and ship stores from one to the other. The Mexican custom officers forbade this, requiring all articles to pass through their office, so that their stamp tax certifying invoices could be collected. Against this there was an earnest protest by the minister of the United States, made to the Mexican government, which agreed to his claim and disavowed the exactions of the customs house officers. Here the exemption of ships of war from customs regulations is conceded, and the exemption is extended to their boats and their intercourse, with one another, quite in accord with principle. Calvo[1] says that notably in France foreign ships of war are exempt from customs and from "*taxes de consomation interieure*" as to merchandise they take on board for their voyage or for their daily provision, quite in accord with the final ruling of the Mexican government above.

Government ships which are not vessels of war, it has been claimed, stand on somewhat different footing. In the well known case of the *Parlement Belge*,[2] it was held in 1878 that a public vessel of a foreign state, not a ship of war, carrying the mails, and also carrying merchandise, is nevertheless exempt from the jurisdiction of the admiralty courts in England. The ship in question was a mail packet, running between Ostend and Dover, and was the property of His Majesty, the King of the Belgians, carrying the royal pennant, and navigated by officers of the royal Belgian navy, holding commissions. In addition to the mails, however, it was shown that she carried merchandise and passengers and their luggage for hire. A proceeding in rem was instituted against this vessel by the owners of the Daring for redress in respect of a collision, but Sir Robert Phillimore held that the vessel, being in the possession of His Majesty, the King of Belgium, as a sovereign, and being a public vessel of state, could not be attached, the exemption being put upon the same footing with that of a sovereign or his representative, an ambassador.

A transport employed by a sovereign government is sometimes said not to be exempt from local control like a vessel of war. The

[1] Le Droit International Tome 3, p. 339.

[2] L. R. 5. Prob. Div., 197.

writer is advised, however, by a letter from the minister of the United States accredited to Japan, that in 1900 the question arose between the governments of the United States and Japan, in the case of the demand for the surrender of a man on a United States government transport at Nagaski, charged with a crime committed upon a Japanese on board. The local officials were denied the right to arrest, and, on the representations of the minister to the Japanese government that the ship was a transport belonging to the United States government, want of jurisdiction was acknowledged. The case seems wholly in accord with the previous English cases, and the circumstance that the injury was to a citizen of the local state makes it the stronger. Calvo justly quotes Dana's notes to Wheaton with high approval, that the immunities enjoyed by ships of war depend more on their public than on their military character.[1]

Ortolan[2] shows that crimes or torts committed on board a vessel of war in a foreign port, or territorial waters, by members of the crew, or any one else, fall solely under the jurisdiction of the tribunal of the nation to which the war ship belongs, and are tried according to the laws of that nation. He relies for this on Wheaton, and says Vattel declared the law the same in his time. He lays down the rule,[3] that the local authorities have no right to come on board the foreign war vessel to do any act of police, of arrest, for acts done on board, or elsewhere. "*Les Navires de guerre etant totallment exempts de la jurisdiction etrangere;*"[4] and that they are exempt generally from the visits of customs officers.

It is not easy to find precedents for actions where the foreign vessel of war violates the law of the country in whose waters it is. If we admit that the privileges of the foreign ship of war are kindred, if not identical, with those of a visiting sovereign or his ambassador, that intimates that the principal, and commonly the only, remedy is a representation by the nation whose law is violated, to the sovereign authority of the nation whose ship has violated its laws, relying upon redress as a matter of comity and policy, not of right enforcible in any national tribunal. Taylor,[5] thinks the only exception such extreme cases as require the prompt expulsion of

[1] Calvo, Droit International, Tome 3, p. 337, Ed. 5.

[2] Diplomatie de la Mer, — Tome 1, p. 298, 3rd Ed.

[3] P. 300.

[4] P. 227.

[5] P. 307.

the vessel where she is the focus of intrigue or instrument of conspiracy.

Where the neutrality of the territorial waters is violated by a foreign war ship, it is plain, however, that the territorial authority may use force to prevent or put an end to the violation, and, moreover, such an act of violation cannot be the basis of a lawful prize. The neutral nation not preventing it may make itself liable to the nation injured.

The case of the *General Armstrong*[1] seems to admit this. There an American armed brig was destroyed in the harbor of Fayal by a British man-of-war in 1814, and this was the foundation of a claim by the United States against Portugal for not keeping the peace in her territorial waters. It was decided by Louis Napoleon, as arbiter, in 1851, against the United States, on the ground that the American captain did not in time apply for protection, and fired first upon the British.[2]

In 1604, James I. of England, by proclamation, forbade acts of belligerency within certain limits of his dominions, fixed by a straight line drawn from one point to another about the realm of England. Yet, in the succeeding year, the Dutch and Spanish fleets fought furiously in Dover harbor, and the English only intervened by firing from the Castle battery, when the victorious Dutch, at the end of the second day, tied their Spanish prisoners two and two, and threw them into the sea.[3]

In 1666 the Dutch East India fleet was attacked by the British admiral in the harbor of Bergen. The governor of the town fired upon the assailants.[4]

When the United States war steamer *Wachusett*, in 1864, captured the confederate cruiser *Florida* in the harbor of Bahia (Brazil), and towed her to sea, she was pursued by a Brazilian man-of-war, but escaped by superior speed. The act was repudiated by the United States, and it was held by the Supreme Court of the United States that Brazil was justified by the law of nations in demanding the return of the captured vessel, and proper redress otherwise, and that the captors acquired no rights.[5] And Sir W.

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[1] 2 Wharton's Dig., 604; Snow's Cases Inter. L., p. 396.

[2] See also the case of the Grange, *supra;* Commodore Stewart's Case, 1 Court Claims, 113, 1864; Scott's Cases, 910.

[3] Walker, Inter. L., pp. 169-170; Grotius, Hist., XIV., p. 794.

[4] Quoted in Commodore Stewart's case, *supra*, from Vatt., Bk. III., Ch. VII., Sec. 132.

[5] The Florida, 101 U. S. 37.

Scott declared, "When the capture within the neutral territory is established, it overrules every other consideration, the capture is done away, the property must be restored, notwithstanding it may actually belong to the enemy."[1] As Ortolan declares[2] if the vessel of war in territorial waters undertakes to commit any acts of aggression or of hostility or violence, whatever, it is the right of all nations to immediately take all the measures, and employ all the means necessary for a legitimate defense. Chief Justice Marshall, in the great case,[3] which is the foundation stone of the exemption of ships of war, confines the exemption to such time as the ship is "demeaning herself in a friendly manner."

Sir J. Fitz J. Stephens, in his opinion as one of that very distinguished body of commissioners appointed by the government of Great Britain in 1876 to inquire into the course to be pursued when fugitive slaves sought refuge upon British ships of war in the harbors of countries tolerating slavery, considers the duties of those participating as affected by British or foreign law, and he says:—

"If the commanding officer, being called upon by the local authorities to perform any act which he was bound to perform by international law, were to refuse to do so, the authorities would have to seek their remedy by diplomatic means, by reprisals, or, in the last resort, by war."[4]

The regulations of Mexican law on this subject (certified to the writer by the courtesy of the Mexican minister to the United States, His Excellency, M. de Aspiroz), while wholly repudiating the right of asylum in foreign ships, provide a very just and correct procedure, and, it is believed, in accord with practice:—

"Whenever it may become known that a war vessel has a criminal on board, the authority of the port shall demand from the captain of the ship that the criminal be delivered to him. If, upon such request, the captain shall state that the criminal is not on board, his assertion must be believed; but should he refuse to deliver up the criminal, such an act shall be communicated to the government of the Republic, who in turn may make the proper claim from the nation to which the vessel belongs."

The contention of Sir J. Fitz J. Stephens, maintained with great force, is that the foreign vessel of war in territorial waters enjoys certain exemptions as to her crew and herself, but that, if two Italians go on a French man of war in Portsmouth Harbor, and one stab the other, if the French captain give up the offender, he could

[1] The Vrow Anna Catharina, 5 Rob., 15.

[2] Diplomatie de la Mer., p. 218.

[3] The Schooner Exchange *v.* M'Fadden, 7 Cranch., 116.

[4] Stephens. History Criminal Law, Vol. 2, p. 45.

be tried by the English courts, even if no English process would run on the French ship.[1] He turns it too, most ingeniously, and says if a British ship of war were in a French port, and two Frenchmen were working on board, and one killed the other, must the captain carry the offender to England for trial?[2] These illustrations certainly expose the weakness of the argument for absolute extra-territoriality, although they by no means impeach the rule against the exercise of jurisdiction over a foreign ship of war in territorial waters by direct interference with her. No cases of the kind given in illustration have been observed by the writer as adjudicated by the courts. Sir J. Fitz J. Stephens contends that the local sovereign tacitly undertakes to "abstain from all interference between the commanding officer and the ship's company, brought by him into territorial waters."[3] It must be admitted that the local sovereign makes like concessions as to the ship and her fittings and belongings as well, and further than this it seems the courts have not gone, except in giving the reasons of decisions, although the writers have.

PRIVATE SHIPS

When we turn to private vessels, the rule is very different. There the right of the local sovereign to enforce jurisdiction is not embarrassed by meeting the official power of an independent nation, and yet, as Ortolan has well pointed out, a merchant ship is not in the same case with a single traveler. It contains a company, he says, organized and ruled within, in conformity with the laws of its own country.[4]

The International Law Association, as well as the Institute of International Law, have expressed their adhesion to the view that in the littoral waters within the three-mile limit, all ships, without distinction, have the right of innocent passage, with certain exceptions in time of war, and as to ships of war, and that crimes committed on board foreign ships so passing, on persons or things on board, are without the jurisdiction of the neighboring country, unless they violate its rights or laws.

It is necessary to inquire, how far the present law is in agreement with this declaration.

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[1] Hist. of Crim. L., Vol. 2, p. 48.

[2] Page 52.

[3] Vol. 2, p. 49.

[4] Diplomatie de la Mer, pp. 228-9.

The line of cases is familiar dealing with jurisdiction over merchant ships in ports and harbors. Such jurisdiction is fully conceded to the local authorities as matter of right, with a practice of not exerting it unless interests beyond those of the ship and her company are involved.

In 1806, in the case of the *Sally*, an American ship in the port of Marseilles, and the *Newton*, an American ship in the port of Antwerp,[1] the Council of State of France held that in case of severe assaults by one of the crew on another, either in the ship's boat or on the ship herself, the local tribunals had no jurisdiction to entertain prosecutions, and this on the ground that "the tranquillity of the port is not compromised."

In 1837 there was a case of poisoning on a Swedish vessel. The *Forsattning* anchored in the Loire, and the court at Rennes had doubts as to the competence of the Swedish authorities, but the French government directed that the criminal be delivered up to the proper authorities on board his own ship.[2]

In 1859, the Court of Cassation decided in the case of the mate of the American merchantman, *The Tempest*, who had killed one of the crew, and severely wounded another, on board the ship in the port of Havre, that wherever the act is of a nature to compromise the tranquillity of the port, or local intervention is invoked, or the act is a crime by the law common to all civilized nations, the local authorities may intervene, and this notwithstanding treaties giving exclusive charge of the internal order of the merchant vessels of their nation to the foreign consuls.[3]

In 1875 the supreme court of Mexico, in the case of *L'Anemone*, held that, where murder is committed by one of the crew of a French ship anchored in a Mexican port, and the body is brought ashore for burial, yet that it is not *necessarily* a disturbance of the peace of the port, and that the local courts will not assume jurisdiction.[4] Counsel for the defense in this case distinguished it from the case in the harbor of Havre, as there the French courts assumed jurisdiction, (he asserted), to prevent the accused from being lynched by the sailors of the port.

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[1] Wheaton, El. In. L. 3rd Ed., 153, 1 Phillimore, Inter. L. 3rd Ed., 484; Ortolan's Diplomatie de la Mer, 1, 450; Snow's Cases, Inter. L., 121.

[2] 1 Phillimore, Inter L., p. 485; Revue de Legisl. et de Jurisprud. fevrier, 1843, Tome XVII, p. 143.

[3] Ortolan, Diplomatie de la Mer, 1, 455; Snow's Cases, Inter. L., 122.

[4] Snow's Cases Int. L., p. 124; *Journal de Droit International Privé*, 1876. p. 413.

In 1886, the Supreme Court of the United States decided the case of Wildenhus,[1] where the accused, a Belgian sailor, killed a fellow Belgian sailor on the Belgian steamer *Noorland* while she was moored at the dock in Jersey City, New Jersey. Wildenhus was arrested by the New Jersey authorities, whereupon the Belgian consul applied to the federal courts for his release on *habeas corpus*. It was held that,

"It is part of the law of civilized nations that when a merchant vessel of one country enters the port of another for the purpose of trade, it subjects itself to the law of the place where it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement, and the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship."

That by comity it came to be understood among civilized nations that matters affecting only the vessel and her crew, and not involving the peace or dignity of the country or tranquillity of the port, should be left to the authorities of the nation to which the vessel belonged. That the usage was the opposite as to crimes disturbing the peace and tranquillity of the country, and the offender was never exempt "if local tribunals see fit to assert their authority." That the treaty with Belgium gave the consuls of Belgium jurisdiction only over offenses on board which did not disturb public tranquillity. That the very nature of felonious homicide, whether committed with publicity and clamor or not, disturbs the quiet of a peaceful community. Its effect is not confined to the ship and her crew, and the local courts can take jurisdiction.

Treaties of the character mentioned as existing between Belgium and the United States now exist between very many, if not most, of the civilized countries of the world, thus between Japan and Germany and Belgium, and the United States has such treaties with twelve of the principal countries of the world, and with many lesser powers.

This case was cited and relied upon in in 1893, in *United States* v. *Rodgers*,[2] which held that the federal courts had jurisdiction of a prosecution for an assault with a dangerous weapon, committed upon a steamer belonging to United States citizens, which was at the time upon the Canadian side of the Detroit river, and so in the territorial waters of Canada, it being held a part of the high

[1] 120 U. S., 1.

[2] 150 U. S. 249.

sea, and Mr. Justice Field points out in the opinion that Mr. Webster, secretary of state of the United States, in a letter to Lord Ashburton in 1842, said:—

"It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the state retains its jurisdiction over them; and, according to the commonly received custom this jurisdiction is preserved over the vessels, even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel, by one of the crew upon another, or upon a passenger, while such vessel is lying in a port within the jurisdiction of a foreign state or sovereignty, the offense is cognizable and punishable by the proper court of the United States in the same manner as if such offense had been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her masters or owners, she and they must, doubtless, be answerable to the laws of the place; nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships, not only over the high seas, but into ports and harbors wheresoever else they may be waterborne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the teritory of the nation itself."[1]

As illustrating the complete control by local authority of the foreign merchant ship and her crew in a harbor, I refer to the fact, mentioned by Sir Travers Twiss,[2] that when a British ship entered a port of South Carolina, while slavery was still maintained, there being a local law forbidding free negroes to be abroad in the state, if there were free negroes among her sailors, though British subjects thay were taken from the ships by officers of the port and locked up until the vessel cleared outwards, when they were returned.

Difficulty in deciding whether the statutes of a country apply to ships entering her waters has arisen, in a manner typical as to all statutes, in the matter of patents. Thus[3] in 1851 the High Court of Chancery granted an injunction against subjects of Holland to

[1] 6 Webst. Works, pp. 306, 307.

[2] Law of Nations, p. 273.

[3] Caldwell *v.* Van Vlissingen, 9 Hare, 415.

restrain them from using aboard their ships within the dominion of England, without license of the plaintiff, an invention to which plaintiffs were exclusively entitled under the Queen's Patent. The patented articles were propellers on vessels trading from Holland to England, and the vice-chancellor gave the case of a railway engine running from Scotland to England as analogous, and refused to consider the reciprocal inconvenience of proceedings of this sort in various countries. The case was not appealed, but the English statute was shortly modified to prevent the recurrence of such hardships.[1]

In 1856 an action for infringement was determined, brought by the owner of a U. S. patent upon certain forms of gaffs, against the proprietors of a French schooner, for entering Boston Harbor with such gaffs upon her. The United States supreme court held that patent laws were intended solely for the regulation of domestic matters, and that articles upon a foreign ship, lawfully made abroad, were not within their contemplation, and the court was unable to follow the English decision.[2]

Two interesting but conflicting decisions, involving like principles, were made in 1901 with regard to local jurisdiction over foreign merchant vessels in American waters. In the *Kestor*,[3] it was held that a federal statute prohibiting the prepayment of wages of seaman applies to such prepayment in American waters of the wages of seamen who are British subjects shipping in American ports on British merchant vessels, there being no treaty between the United States and Great Britain inconsistent therewith. The decision was by the District Court of Delaware, and, reviewing the cases as to jurisdiction over merchant vessels, it held that any rights of extra-territoriality depended upon international comity, or upon treaties; and that either one would be overridden by a definite provision of a statute, at least if the statute were of later date than the treaty. The U. S. District Court for the eastern district of Pennsylvania, in the same year, and about six weeks previously, held:—[4]

"A foreign vessel is a part of the territory of the country to which she belongs, and although she is subject to the laws of the United States in certain respects, while in our ports, Congress has no *power* to control her domestic affairs, such as the terms on which she ships her crew, or the time or manner

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[1] See Howard's Reports, Vol. 19, p. 184.

[2] Brown *v.* Duchesne, 19 Howard, 183.

[3] 110 Fed. Rep. 432.

[4] The Eudora, 110, Fed. Rep., 430.

of the payment of their wages, which are matters that properly concern the ship and crew alone, subject to the law of her flag."

This decision dealt with the same statute as the former case, but reached an absolutely different conclusion.

The matter coming before the supreme court,[1] it was held that it was within the power of Congress to prescribe penal provisions as in said statute, "and no one within the jurisdiction of the United States can escape liability for a violation of those provisions, on a plea that he is a foreign citizen, or an officer of a foreign merchant vessel"; that the implied consent of government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which those vessels belong may be withdrawn; that the statute in question in its terms applied to foreign vessels as well as those of the United States, and the courts must administer it accordingly.

The courts of the country to which a vessel belongs are, however, quite generally held to have concurrent jurisdiction over offenses committed on that vessel, even within the territorial waters of another sovereignty. England assumes such jurisdiction by statute,[2] and even extends it to three months after employment on a British ship. The United States, by legislation, claim jurisdiction over crimes against the laws of the United States out of the jurisdiction of any state.[3] So in 1868,[4] James Anderson, an American citizen, was indicted in the Central Criminal Court for murder on a Nova Scotia vessel, which at the time of the act complained of was in the river Garonne, about forty-five miles from the sea. It was held that France might enforce her laws, but that the offense was also within British territory, as done on a British ship, where great ships go and the tide ebbs and flows. In *U. S.* v. *Bennett*,[5] the same doctrine was declared as to a crime on an American vessel in the same river. But this jurisdiction attaches to the crime in such foreign territory solely because of its connection with the ship. Almost all the cases involving jurisdiction over foreign merchant vessels have arisen with reference to ports and harbors, and the local law is commonly treated as having a far more assured hold in

[1] Patterson *v.* Bark Eudora, 190 U. S., 169.

[2] Foreign Jurisdiction Act, 6 and 7 Vict. c. 94, 18 and 19 Vict. c. 91, 41 and 42 Vict. c. 67; Phillimore, Inter. Law, Vol. IV, pp. 800-1.

[3] R. S., sec. 730; Taylor, Inter. Law, p. 196.

[4] Regina *v.* Anderson, 11 Cox C. C., 198; Scott's cases, Inter. L., 331.

[5] 3 Hughes, 466, Scott's Cases, p. 336.

such waters than in the littoral sea. Hall, however, takes a different view, and contends, with much force, that there is no reason for any distinction between the immunities of a ship using its right of innocent passage, and of a ship at rest in the harbors of the state,[1] and that the local state must be held to preserve her territorial jurisdiction in so far as she chooses to exercise it, over the passing ships and those on board, as fully as over ships and persons in other parts of her territory.

The widely known case of *Regina* v. *Keyn*,[2] seems to be the final authority as to jurisdiction over the three-mile limit, except as the jurisdiction is otherwise defined, as is judged from a memorandum procured for the writer from the Board of Trade by the kindness of Hon. H. Clay Evans, U. S. Consul General at London, and, in that case, a divided court, by a majority of one, held that England had, in the absence of statute, no jurisdiction over the adjacent seas for three miles or for any space whatever, beyond low-water mark, at least so as to have the right to try a foreigner for a crime committed upon a foreign ship passing through those waters.[3] This doctrine was opposed by a very able dissenting minority, and was followed by the declaratory act of Parliament in 1878, asserting the jurisdiction of Great Britain, but providing that prosecutions for offenses on foreign ships in these waters should be only on the consent and certificate of a secretary of state. By the memorandum from the Board of Trade mentioned above, reference is made to Halleck's International Law,[4] for this passage upon this topic:—

"The question how far the law of a local state is applicable to a foreign vessel passing along or anchoring in its territorial waters has led to much divergence of opinion, but it may now be considered settled that a foreign vessel which does no more than pass along the coast of a local state in that part of the sea which forms a part of its territorial waters, is subject, while so passing along or temporarily anchoring, to the sovereignty of such state, insomuch that, in the absence of other legislation, it is bound to respect the military and police regulations adopted by the state for the safety of its territory and of the population of the coast. The vessel in other respects is as free as if it were on the high seas. But the local state has a right to legislate with respect to its territorial waters, and in such case the vessel becomes subject while in the territorial waters to such local laws as may apply to it."

In a curious and interesting case in 1864,[5] a United States court

[1] Hall's Inter, L., p. 201-202.

[2] L. R. Exchequer Div., p. 63, The Franconia Case.

[3] The crime was a homicide caused by an alleged negligent collision.

[4] 3rd Ed., Vol. 1, p. 157, et sequitur.

[5] United States v. Smiley, 6 Sawyer, 640 Scott's cases, Inter. L., p. 302.

dealt with these facts. An American steamer, *The Golden Gate*, from San Francisco for Panama, with nearly a million and a half dollars of treasure on board, was burned, and sank on the Mexican coast, within one hundred and fifty feet of the shore, and, some two years thereafter, most of the treasure, which had been buried in the sand in the ship's safe, was recovered by Smiley, who was criminally prosecuted in the United States for the wrongful taking. The court, per Mr. Justice Field, held that the crime, if any, was consummated within Mexican territory, and that whatever jurisdiction might belong to the United States over her vessels sailing within that zone, none attached to an abandoned wreck. "When a vessel is destroyed and goes to the bottom," he says, "the jurisdiction of the country over it necessarily ends, as much so as it would over an island which should sink in the sea." It is submitted that this case clearly recognizes the criminal jurisdiction of the neighboring country over the littoral sea, and that it is exclusive, except in case of foreign vessels, and that in a matter not pertaining to revenue, fisheries, navigation, quarantine, or neutrality; the court moreover reaches the conclusion against its own country's right, so that the decision has added weight, and seems not wholly in agreement with the opinion of the majority of the judges in *Regina* v. *Keyn*, *supra*.

Lord Coleridge, in his dissenting opinion in that great case, says, that as he understands the proposition of the majority, it is "that for any act of violence committed by a foreigner upon an English subject within a few feet of low-water mark, unless it happened on board a British ship, the foreigner cannot be tried, and is dispunishable."

Hall says that the case was decided "on municipal and not international law,"[1] but the majority of the court seem to disclaim jurisdiction under either law.

CONCLUSIONS

It is submitted that the result of the authorities is:

1. That a foreign government ship in territorial waters is not exactly "extraterritorial," but simply "inviolable" by local authority, that the extraterritoriality applies only to her foreign crew and equipments, and this only by general comity.

2. That her inviolability continues only while she is "demeaning herself in a friendly manner."

[1] P. 202.

3. That as to vessels belonging to private owners in foreign territorial waters, jurisdiction attaches whether those waters are enclosed or littoral, very much at the discretion of the local state, but with a constant practice in local authorities to refuse jurisdiction if the ship and its company are alone affected.

4. That as to whether they are alone affected in cases of crimes seems even where there is no direct injury to any other, a question dependent upon the gravity of the crime, and one upon which the cases are not agreed.

5. That as to whether, in matters of private right, the courts of the locality are compellable to enforce local law against a foreign ship, and those upon it, in local waters, depends upon extremely diverse interpretations of local law, as intended, or not intended, to so apply.

6. That local law enacted by any state may by its terms be made applicable to such foreign vessels and their crews coming within the territory, and will then be enforced against them by the local courts.

7. That it can not be said that any established principle of international law preserves any measure of absolute independence to private vessels in territorial waters, although it comes near to preserving, and perhaps does preserve, such independence for government vessels.

When it is recalled how important it is to determine the jurisdiction under which an act is done, in order to determine its legality or criminality, whether it is binding or nugatory, the need is plain of simple, uniform and permanent rules which shall determine the jurisdiction over ships in these territorial waters, which are, in the nature of things, the most populous of all waters. Rights and duties arising from births, marriages, deaths and the making of wills, must be ascertained from such incidents occurring upon ships in such waters. The criminal liability of many acts *mala prohibita* only must be determined. It is a crime to use oil which is not of a certain proof in one jurisdiction; it is not in another. It is a crime to sell intoxicating liquors in certain communities, and without special license in most. A marriage is void if by a certain ceremonial in one country, and such a ceremonial may be binding in another. A doctor can prescribe lawfully under his license in one, and not in another. A birth is legitimate by the laws of one, and illegitimate by those of another. Citizenship and public obligation depend upon the place of birth. The place of the ship at the

moment of the "fact" must often be determined in darkness and fog, as within or without the three mile limit, within or without the "line of respect," as Pinheiro-Ferreira has put it. Mr. W. E. Hall, in his learned work on "Foreign Jurisdiction of the British Crown,"[1] has collected some important cases, in which murderous sailors escaped prosecution through uncertainty in this respect. It is submitted that, although the decisions and opinions have in many ways favored the authority of the flag in all internal matters, yet the law is still uncertain and difficult; that on many of these points, particularly as to vessels passing along the littoral seas, there are no controlling decisions, the one important one being by a court so divided, and having been contradicted by a declaratory act of Parliament.

The purpose of this imperfect review of the authorities is to point out this conflict and uncertainty in the decisions, at least as to private ships, and to suggest that it must be remedied by general international conventions. The doctrine for which the International Law Society has declared, that those on board a foreign ship passing through the littoral waters are not amenable to local courts unless they violate the rights or laws of the adjoining country, seems by no means to solve the difficulty, since the question always is, does an act at variance with local statutes violate the local law, if done within such waters; does a statute applicable to France or England by its very enactment extend three miles from low-water mark, and, on action brought, must a court enforce it against the passing navigator; is an act upon such ship such violation of the rights or laws of the local power as our resolution considers should be punished by such local power, if the act is one forbidden by the local law in general terms, without reference to sea or land? The decisions as to patents and as to statutes forbidding prepayment of seamen's wages show the conflict in the views entertained, (although the claims in each of these cases were concerning ships in harbor.) The comparatively small number of decisions found on such subjects shows, perhaps, less of inconvenience than might be expected from the present uncertainties, perhaps that the facts are so varied, the field so wide, the indirect results so various, remote, and even subtly derived, that we can trace them out in but few of the cases.

Certainty of right is a great aid to the useful commerce of men, and, it is believed, a principal purpose of the discussion of all ques-

[1] Page 241.

tions of law is to aid the evolution of such certainty, and thus to foster "the interest of mutual intercourse," as C. J. Marshall phrased it, which must always remain the highest pleasure of men and the beneficent source of civilization. This is especially true as to questions of maritime international law, like that here considered.

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